2004

State of Utah v. Parley Parker Pratt Stubbs : Reply Brief of Petitioner

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Petitioner,	:	
v.	:	Case No. 20040108-SC
PARLEY PARKER PRATT STUBBS,	:	
Defendant-Respondent.	:	

REPLY BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in reply to respondent's brief.[1]

ARGUMENT

A. A trial court does not err in declining to rule on a late-filed motion for change-of-venue under *State v. James*, when the court can conduct voir dire of a presently assembled panel to determine its suitability.

The State argued in its opening brief that the court of appeals' decision eviscerates *State v. Widdison*, 2001 UT 60, 28 P.3d 1278, and that it will "encourage defendant's to move for a change of venue too late to seek an interlocutory appeal, and then seek direct appellate relief under the *James* factors, despite the fact that their juries were actually fair and

[1] The State's reply is limited to answering new matters raised in respondent's brief.

impartial." Resp. Br. at 15 (citing *State v. James*, 767 P.2d 549 (Utah 1989)). Defendant asserts that the court of appeals' decision creates no such risk because this Court has recognized in *State v. Pieren*, 583 P.2d 69, 72 (Utah 1978), that a trial court is free to exercise its discretion to deny a late-filed motion for change of venue. Resp. Br. at 16. *Pieren*, however, proves that *Widdison*, and not *James*, applies to this case.

The defendant in *Pieren* announced on the Thursday before a Monday trial that he was ready to proceed. *Pieren*, 583 P.2d at 72. The next day, Friday, the defendant moved for a change of venue, although he had known of the basis for his motion long before. *Id.* The trial court denied the motion as untimely. *Id.* This Court upheld the ruling, recognizing that although statute permitted a venue motion at any time before trial, "the court can properly refuse to grant [the motion] in the interest of *efficient litigation*, if [the court] can see no apparent reason for the change of venue (other than delay) and it is likely that a jury can be selected without great difficulty." *Id.* (emphasis added).

The "interest of efficient litigation," recognized in *Pieren*, coincides with the same consideration—"judicial economy"—recognized in *Widdison*. *Widdison*, 2001 UT 60, at ¶ 38. *Widdison* recognized that judicial economy was served in *James*, where defendant was on *interlocutory appeal* from a timely-presented motion for change of venue. *Id.* *Widdison* also recognized that when an appeal is taken from a *jury verdict*, the relevant issue is whether defendant "was ultimately tried by a fair and impartial jury." Thus, the *James* factors, which are designed to evaluate the possibility of bias *before* a jury panel has been assembled, would waste, not save, judicial time and resources.

In this case, the trial court followed the "interest of efficient litigation" approved in *Pieren.* Like Pieren, defendant did not move to change venue until six days before trial, even though, defendant, like Pieren, had long been aware of any basis for the motion. Defendant then stipulated at a status conference the day before trial to have his venue motion heard at the time of jury selection, when the panel had already been assembled (R. 208-09, 213-14). Defendant's delay in filing the motion and his subsequent stipulation left no time for obtaining a ruling and seeking an interlocutory appeal. Thus, while the trial court generously gave defendant's motion more-than-passing consideration under the *James* factors, it properly recognized that the essential inquiry lay in determining whether the jury actually assembled would be fair and impartial (T. 58-60). In these circumstances, judicial economy would not have been served by the trial court's applying the *James* factors to assess a hypothetical Beaver County jury for presumptive bias when, with defendant's stipulation, it could evaluate true bias, if any, through voir dire of the prospective jurors actually assembled. By insisting that the court failed to properly consider defendant's motion under the *James* factors, the court of appeals mandated that the trial court consider a late-filed motion for change of venue and then allow a defendant time to seek interlocutory review. The result flies in the face of *Pieren* by creating the very judicial waste that *Pieren*, *James*, and *Widdison* all sought to avoid.

In short, the court of appeals failed to recognize that given defendant's stipulation, the trial properly declined to determine a generalized possibility of bias in the community under *James* in favor of an individualized voir dire of presently assembled prospective jurors.

B. The Court should not consider defendant's alternative argument, that he was prejudiced by a biased jury, because he not only waived his claim, but also invited error by passing the jury for cause.

Defendant argues that *Stubbs* may be upheld on alternative grounds that some of the jurors who sat were biased. Resp. Br. at 20-21 (citing *American Fork City v. Pena-Flores*, 2002 UT 131, ¶ 7, 63 P.3d 675 (recognizing the supreme court "may affirm the court of appeals' decision on any ground supported in the record") (citations omitted)). Specifically, defendant asks this Court to find that he was denied a fair and impartial jury because the trial court seated four "objective[ly]" biased jurors from a panel composed of other biased jurors too numerous to remove with peremptory strikes. Resp. Br. at 21-22 (citing Utah Code Ann. § 77-1-6 (West 2004), article I, sections 7 and 12 of the Utah Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution).

The Court should decline defendant's invitation for two reasons: (1) certiorari review was not granted on this issue; and (2) defendant waived the claim and invited any error when he failed to object and thereafter passed the jury panel for cause in the trial court.

The State sought certiorari review on the following issue: "Should the Court review the court of appeals' exception to the rule of *Widdison*, where defendant conceded that he was tried by an impartial jury?" Pet. at 1. Defendant cross-petitioned for certiorari on the following question: "Assuming [*Widdison*] applies, did the trial court's denial of the motion for a change of venue deny Stubbs a fair trial under *Widdison*?" Cross Pet. at 1. This Court granted the State's petition and denied defendant's petition. The only issue raised by the question on which this Court granted review is whether the court of appeals improperly

applied the *James* factors in reversing the trial court. This is a purely legal issue. It does not fairly include an factual claim that any of the juror who sat were biased.

In any event, defendant waived any claim that any juror was biased when he did not challenge any of those jurors for cause and then passed the jury panel for cause. "It is well-settled that in order to preserve for appellate review a 'for cause' challenge to a prospective juror, counsel must contemporaneously state the reason for the challenge in distinct and specific terms." *State v. Gray*, 851 P.2d 1217, 1223 (Utah App. 1993). In *State v. Wach*, 2001 UT 35, 24 P.3d 948, this Court affirmed that "[t]his court has long maintained that a party cannot seek to reverse and unfavorable verdict by complaining of an error that the trial court could have corrected had it been timely informed of the error." *Id.* at ¶ 40 (citations omitted). In *Wach*, voir dire of a juror raised an inference of bias which the trial court failed to rebut. *Id.* ¶ 34. For the first time on appeal, Wach claimed that he was prejudiced because, by having to expend a peremptory challenge to remove the juror, he was deprived of the opportunity to remove one of two other jurors whom he claimed should have been removed for cause. *Id.* at ¶ 37. However, there was nothing in the record to indicate that Wach challenged the two allegedly biased jurors for cause until after the jury was sworn. *Id.* at ¶¶ 38-39. Consequently, this Court refused to consider the merits of whether Wach was tried by a fair and impartial jury. *Id.* at ¶ 40. The Court concluded that "[the defendant's] failure to make any objection whatsoever to the [two allegedly biased jurors] before the challenged jurors were excused from service and the jury was sworn to try the action constitutes a waiver, barring [a defendant] from inquiring into the bias question." *Id.*

As set out in the State's opening brief, defendant challenged only three jurors for cause. Petr. Br. at 3-4 (citing T. 44-46). The trial court removed all three (T. 44-50). Defendant never challenged any other juror for cause, even though the trial court afforded him ample opportunity to question remaining jurors (T. 44, 46-47, 61-75, 82-84). For the first time in the court of appeals, defendant claimed that jurors Pamela McMullin, Deserie Dalton, Curtis Sherwood, and Nella Burnette should have been stricken for cause, even though he never challenged them for cause. Aplt. Br. at 28-32; Cert. Opp. at 7-8, 10, 12; Resp. Br. at 22 n.8. Like *Wach*, defendant claimed that he was unable to exercise his peremptory challenges against other jurors who should have been removed for cause. Resp. Br. at 22 n.9. Having indisputably failed in the trial court to challenge *any* of the allegedly biased jurors for cause, however, defendant waived his right to ask either the court of appeals or this Court to "inquir[e] into the bias question." *Wach*, 2001 UT 35, at ¶ 40.

Notwithstanding his failure to challenge any sitting jurors for cause, defendant suggests that his repeated challenge to the "panel as a whole," as it related to his venue motion should have put the trial court on notice that some jurors should have been removed for cause. Resp. Br. at 18-20 (citing T. 51, 100). The record does not support the claim.

"Some form of *specific* preservation of claims of error must be made a part of the trial court record before an appellate court will review such a claim on appeal." *State v. Johnson*, 774 P.2d 1141, 1144-45 (Utah 1989) (emphasis in original) (citation omitted). *See State .v Elm*, 808 P.2d 1097,1099-1100 (Utah 1991) (finding mere general objection to sentence insufficient to preserve the issues for appeal) (citations omitted).

Any claim that a challenge to the "panel as a whole" preserved a specific challenges to jurors McMullin, Dalton, Sherwood, and Burnette is specious. First, defendant raised his challenge to the entire panel in support of his change-of-venue motion only after the trial court had completed its initial voir dire (T. 42-60). At that point, jurors Burnette and Sherwood were not even on the sixteen-member jury panel that the trial court was then questioning, but only took their positions on the panel when prospective jurors Gay and Carpenter were subsequently excused for cause (T. 76, 82). Thus, defense counsel's non-specific challenge to "the panel as a whole" could not have related to jurors Burnette and Sherwood. Second, defendant's in-chambers "objection to the panel as a whole" was demonstrably not directed to jurors Dalton and McMullin. Although prospective jurors Dalton and McMullin were on the panel when defendant made his in-chambers "general objection," at that point, defendant specifically challenged only prospective jurors Nelson, Carpenter, and Gay, all of whom the court excused (T. 21-24, 44-45, 48-50, 76). *See State v. Gray*, 851 P.2d 1217, 1223 (Utah App. 1993) (requiring "for cause" challenge to be timely and specific). Finally, a challenge to the "panel as a whole," in the absence of challenges to specific jurors, is insufficient to support a claim that the jury was not fair and impartial. *Elm*, 808 P.2d 1097 at 1099-1100.

In sum, defendant's "[general] objection to the panel as a whole" was insufficiently clear and specific to preserve both his challenges to the trial court's denial of his motion for change of venue and to any of the allegedly biased jurors, or to show that an impartial jury sat.

In any event, defendant invited any claimed error. "The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal.'" *State v. Perdue*, 813 P.2d 1201, 1205 (Utah App. 1991) (quoting *State v. Henderson*, 792 P.2d 514, 516 (Wash. 1990)); *accord State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993). The purpose of this rule is to discourage a defendant in a criminal case from inviting prejudicial error and then implanting it in the record "as a form of appellate insurance against an adverse sentence." *State v. Parsons*, 781 P.2d 1275, 1285 (Utah 1989), *habeas corpus denied by Parson v. Galetka*, 57 F. Supp.2d 1151 (1999). *See State v. Medina*, 738 P.2d 1021, 1022-23 (Utah 1987) (declining to review a challenge to a jury instruction stipulated to by defense counsel at trial under invited error doctrine).

Defendant not only failed to challenge any of those allegedly biased jurors for cause in the trial court, but he invited any error by affirmatively passing the jury for cause. The record shows that following its initial round of voir dire questions, the trial court, sua sponte, removed three jurors for cause (T. 13-19, 24-25). Thereafter, at defense counsel's request and based on additional voir dire designed to explore prospective jurors' relationships with the victim's family, the court removed seven more prospective jurors for cause (T. 44-50, 61-62, 69, 76, 82-84). Nothing in the record indicates that counsel challenged any of the four jurors that he now claims were biased at the close of the trial court's voir dire. Further, at that point, the panel consisted of sixteen prospective jurors whose backgrounds the trial court had fully explored. Following an off-the-record sidebar, the trial court announced that "***[b]oth counsel having passed the jury panel for cause***, they will now exercise what are

called peremptory challenges" (T. 92-93) (emphasis added).

Because defense counsel not only failed to object to allegedly biased prospective jurors, but also affirmatively passed the jury panel for cause, well-established precedent precludes this Court from considering defendant's claim on appeal.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the State respectfully requests the Court to reverse the judgment of the court of appeals and remand to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 17 day of November, 2004.

MARK L. SHURTLEFF
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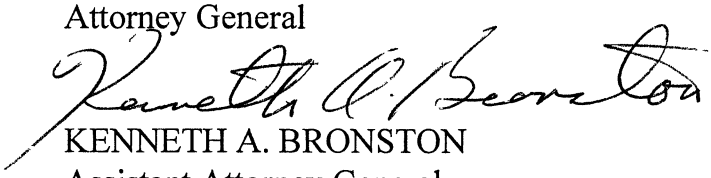

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Reply Brief were mailed, postage prepaid, to Edward K. Brass, attorney for defendant, 175 East 400 South, #400, Salt Lake City, Utah 84111, this 17th day of November, 2004.